

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
PUBLIC UTILITIES COMMISSION) DOCKET NO. 2008-0274
)
Instituting a Proceeding to Investigate)
Implementing a Decoupling Mechanism for)
Hawaiian Electric Company, Inc., Hawaii)
Electric Light Company, Inc., and Maui)
Electric Company, Limited)

PUBLIC UTILITIES
COMMISSION

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**TAWHIRI POWER LLC'S REPLY TO
HAWAIIAN ELECTRIC COMPANY, INC., HAWAII ELECTRIC LIGHT COMPANY,
INC., AND MAUI ELECTRIC COMPANY, LIMITED'S MEMORANDUM IN
OPPOSITION TO TAWHIRI POWER LLC'S MOTION FOR ENLARGEMENT OF
TIME TO FILE MOTION TO INTERVENE AND MOTION TO INTERVENE**

AND

CERTIFICATE OF SERVICE

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Hawaiian Electric Company, Inc., Hawaii Electric Light Company, Inc., and Maui Electric Company, Limited ("HECO Companies") filed their Memorandum In Opposition To Tawhiri Power LLC's Motion For Enlargement Of Time To File Motion To Intervene And Motion To Intervene on November 26, 2008 objecting to Tawhiri Power LLC ("Tawhiri") requesting full party status in this policy-making investigative docket, or in the alternative, permission to submit Position Statements and/or Testimony herein ("HECO's Opposition"). In this Reply, Tawhiri will more fully explain that: (1) it possesses the knowledge and experience which will assist the Hawaii Public Utilities Commission ("Commission") in developing a sound record regarding the development and implementation of a decoupling mechanism; (2) since this is a policy-making investigative docket it is crucial that stakeholders of renewable resource energy generation be given an opportunity to participate in the effort to develop and implement a decoupling mechanism to further the goal of the October 20, 2008 agreement signed by the

Governor of the State of Hawaii, the State of Hawaii Department of Business, Economic Development and Tourism, the State of Hawaii Division of Consumer Advocacy of the Department of Commerce and Consumer Affairs and the HECO Companies ("Comprehensive Agreement"), to meet 70 percent of the State of Hawaii's consumption of energy derived from clean sources by 2030¹; (3) Tawhiri will not unduly broaden the issues or unreasonable delay the proceedings; (4) the Consumer Advocate is statutorily mandated to only represent the interests of consumers of utility services, and hence it cannot represent the interests of producers of energy, such as Tawhiri; and (5) the issue is not whether Tawhiri or its attorneys actually learned of the Initiating Order before the deadline to file a motion to intervene that was stated in the Initiating Order, the inquiry is whether November 17, 2008 is within twenty (20) days of the public being notified of this Docket.

1. Tawhiri Possesses Expertise, Knowledge, and Experience To Assist the Commission in Establishing a Sound and Complete Record.

As stated in Tawhiri's Motion to Intervene, Tawhiri is a Qualifying Facility ("QF") generator that has provided HELCO with renewable wind energy since 2007 and, thus, has the experience and background to assist the Commission in developing a sound and accurate evidentiary record.² Moreover, Tawhiri will bring to the Docket a consultant and witness, Dr. Mohamed El-Gasseir. Dr. El-Gasseir has extensive experience and knowledge in regards to: (1) the HECO systems; (2) electric industry restructuring; (3) stranded assets, revenue dynamics and rate stability issues; (4) renewable energy economics; (5) distributed resources planning; (6) self-

¹ See Order Initiating Investigation in Docket No. 2008-0274 ("Initiating Order").

² Tawhiri's predecessor began negotiations with HELCO to provide wind power in 1999. Thus, Tawhiri is very familiar with the HECO Companies facilities and Operations and the Hawaii Energy Community.

generation assessment; and (7) integrated resource planning.³ Additionally, Dr. El-Gasseir has advised the Regulatory Planning Committee of the States of California, New York, Connecticut, New Jersey, and Nevada. He has also been engaged by many utilities, including some of the largest investment owned utilities such as ConEdison New York, Commonwealth Edison, Chicago Edison, Pacific Gas & Electric, Detroit Edison, Southern Energy, and British Columbia Hydro (to name a few). All of these areas of expertise by Tawhiri and Dr El-Gasseir will enhance the discussion on developing and implementing a decoupling mechanism and lead to a sound record for the Commission.

2. This Is A Policy-Making Investigative Docket, And Therefore, Intervention Should Not Be Limited As In Ratemaking Cases.

HECO Companies argue that intervention by Tawhiri would unduly broaden the issues or delay the proceedings herein and therefore, its Motion To Intervene should be denied.⁴ Tawhiri submits that the Commission should follow its precedence of being permissive in allowing intervention to parties in policy-making investigative dockets. This precedence recognizes the importance of allowing an open discussion of all interested stakeholders when the Commission is setting policy. This is especially true since this investigation was opened pursuant to the Comprehensive Agreement which promotes transparency and input by all stakeholders.⁵

Additionally, the outcome of this policy-making investigative docket will completely redesign the "traditional model of rate-making for the HECO Companies by separating the

³ Dr. El-Gasseir is also very familiar with the California DeCoupling Mechanism, but because this is still a largely uncharted territory, he modestly does not refer to himself as an expert in this area.

⁴ HECO Opposition at 6-7.

⁵ In the Comprehensive Agreement the Signators "committed to being open and truthful" with the community. See Comprehensive Agreement at 1. Additionally, the Signators have stated publicly numerous times that the public would have many opportunities to intervene in the process. Since the DeCoupling Mechanism is being handled through regulatory avenues, Intervention in this Docket is the only way to insure public input.

HECO Companies' revenues and profits from electricity sale."⁶ Therefore, all those affected on both sides of the meter should be heard. Otherwise, if only the interests of the HECO Companies and Consumer Advocate are heard by the Commission, the formulated decoupling mechanism may render operation of independent power producers ("IPPs"), such as Tawhiri, uneconomical; initiating their eventual demise. Such unintended consequence would do violence to the purposes and stated intent of the Comprehensive Agreement.

It is clear from the Commission's Order initiating the Docket ("Initiating Order") that based on the assertions by its proponents, Decoupling has the benefits of encouraging the substitution of renewable resources.⁷ Moreover, Section 28 of the Comprehensive Agreement, titled "Decoupling from Sales," states:

The transition to Hawaii's clean energy future can be facilitated by modifying utility ratemaking with a decoupling mechanism that fits the unique characteristics of Hawaii's service territory and cost structure, and removes the barriers for the utilities to pursue aggressive demand response and load management programs, and customer owned or **third-party owned renewable energy systems**, and gives the utilities an opportunity to achieve fair rates of return.⁸

Therefore, it is only logical, and due process requires, that third-party owned renewable energy systems, like Tawhiri, be allowed to intervene in this Docket to ensure that unintended consequences to not arise.

The ability of Tawhiri to continue to provide renewable wind energy to HELCO and jobs to its employees on the Big Island depends on a Decoupling Mechanism, if any, which provides a level playing field for all stakeholders; receiving a fair and reasonable rate for its renewable wind energy; and an opportunity to be heard when government agencies take actions that may adversely impact its property and financial rights. Thus, it is vital that Tawhiri be allowed to

⁶ See Order at 1.

⁷ See Initiating Order at 2.

⁸ See Initiating Order at 3 (emphasis added).

intervene as a party in this Docket, or at least be granted Participant status and permitted to submit Position Statements and/or Testimony.

3. Tawhiri's Intervention Will Not Unduly Broaden the Issues or Delay the Proceedings.

Tawhiri's Intervention will not unduly broaden the issues or delay the proceedings in this Docket. In fact, the knowledge, expertise, and experience that Tawhiri brings to this docket may actually assist in expediting the proceeding, and reduce the likelihood of developing and adopting a flawed Decoupling mechanism.

Tawhiri is cognizant of the proposed timetable set out in the Comprehensive Agreement and the Commission Order and, thus, will work with the Commission and the other parties to meet them. In that event, Tawhiri, as an intervenor, would not object to the Commission precluding any party in the docket from unreasonably broadening the issues or unduly delaying the proceeding.

HECO Companies' assertion that Tawhiri's intervention and/or participation would broaden the scope of the proceedings and delay them is premature and unfounded. Moreover, the Commission has made a commitment to prevent such developments from taking place.

4. The Consumer Advocate Only Represents the Interest of Consumers of Utility Services.

The Consumer Advocate is only statutorily mandated to represent, protect, and advance the interests of all consumers, including of small businesses, of utility services.⁹ Thus, it does not and cannot represent Tawhiri's interest as an Independent Power Producer that sells energy to the utility. Although, Tawhiri shares the Consumer Advocate's goal for reliable low cost

⁹ See Haw. Rev. Stat. §269-51, as amended.

renewable energy for Hawaii's consumers, Tawhiri has unique business interests that will not and cannot be represented by the Consumer Advocate.¹⁰

5. Due Process Requires that Tawhiri Have Twenty (20) Days From Public Notice to File Its Motion To Intervene.

The Initiating Order states that all Motions To Intervene should be filed within twenty (20) days thereof.¹¹ As indicated in HAR § 6-61-57, however, it is assumed the date of the Commission Order, October 24, 2008, was the date the public was first made aware of the same. In fact, however, public notice was not provided until October 29, 2008.¹² Therefore, Tawhiri's Motion To Intervene is timely because it was filed within twenty (20) days of when public notice of the Initiating Order was first given.¹³

Alternatively, even assuming the deadline to file a Motion To Intervene in this docket was November 13, 2008, Tawhiri has demonstrated "excusable neglect" because it filed its Motion To Intervene within twenty (20) days of the public first (1st) being notified of the Initiating Order. Such facts have been recognized by the Hawaii Courts as "excusable neglect."¹⁴

In either case, to not allow Tawhiri to file its Motion to Intervene would deprive Tawhiri of its due process rights. As stated in Tawhiri's Motion for Enlargement of Time, under current Commission procedures, the only way that Tawhiri is able to receive notice of new dockets at the Commission is to physically go to the Commission and review the Daily Activity Report. In the instant case, the Daily Activity Report did not include the Initiating Order until October 29, 2008.

¹⁰ Also, the Consumer Advocate as a signatory of the Comprehensive Agreement may have a conflict of interest in regards to its representation.

¹¹ Initiating Order at 9.

¹² See generally, HAR § 6-61-57(1)-(2) and Exhibit "A" attached to Motion For Leave.

¹³ Twenty (20) days from October 29, 2008 is November 18, 2008. Since Tawhiri's Motion To Intervene was filed on November 17, 2008, it actually was filed a day early.

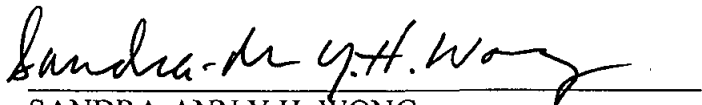
¹⁴ C.f. Enos v. Pacific Transfer & Warehouse, Inc., 79 Hawaii 452, 456, 903 P.2d 1273, 1277 (1995)(Once notice is received, the recipient may no longer claim "excusable neglect" for his failure to act.).

Thus, Tawhiri should be given the full 20 days from October 29, 2008 to file its Motion to Intervene. To not permit Tawhiri the full 20 days would make a mockery of due process. For example, the Commission could initiate an order on Day 1, but not give public notice in its Daily Activity Report until Day 19. Under the HECO Companies' "logic", all motions to intervene would still have to be filed on Day 20 after only one (1) day of public notice. Needless to say, the HECO Companies' "logic" raises constitutional issues of due process violations and claims of injustice. The HECO Companies argument that the point in time at which Tawhiri and/or its attorneys initially learned of the Initiating Order is a red herring and does not negate the fact that Tawhiri should be given the full 20 days from the later of the date of the Initiating Order or Public Notice of the Initiating Order.

VI. CONCLUSION

WHEREFORE, Tawhiri respectfully reiterates its request that the Commission grant its Motion to Intervene, or, alternatively, to grant it Participant status and permit it to submit Position Statements and/or Testimony.

DATED: Honolulu, Hawaii, December 3, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Intervene was duly served on each of the following parties via United States Mail, postage prepaid, as set forth below:

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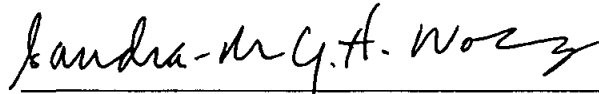
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A handwritten signature in black ink, appearing to read "Sandra-Ann Y.H. Wong", is written over a horizontal line.

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